LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAY 15 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

~~1714~~ 70-175

No. .....

EDGAR C. HEALD,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

WILLIAM EARL BADGETT
608 Bank of Knoxville Building
Knoxville, Tennessee 37902
HAL H. CLEMENTS, JR.
401 Empire Building
Knoxville, Tennessee 37902
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

TABLE OF CONTENTS

Citation to Opinions Below 1
Jurisdiction 2
How Federal Question Is Presented 2
Question Presented 5
Constitutional Provisions Involved 5
Tennessee Statutes Involved 5
Reasons for Granting the Writ 5
Conclusion 7

Appendix—

Writ Denied, Supreme Court of Tennessee A1
Judgment, Court of Criminal Appeals of Tennessee .. A2
Opinion, Court of Criminal Appeals of Tennessee A5
Indictment A7

Table of Authorities

Cases

Fox v. *State*, 214 Tenn. 694, 383 S.W.2d 25 ..... 4, 5

Constitutional Provisions and Statutes

Constitution of the United States—

Fifth Amendment 2, 5
Fourteenth Amendment 2, 5

Tennessee Code Annotated—

Section 39-902 ..... 4, 5
Section 39-904 ..... 3, 4, 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. .....

EDGAR C. HEALD,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioner Edgar C. Heald prays that a writ of certiorari issue to review the final judgment of the Supreme Court of Tennessee entered the 16th day of February, 1971.

CITATION TO OPINIONS BELOW

The judgment of the Supreme Court of Tennessee was unreported, and is simply a statement denying a writ of certiorari to the Tennessee Court of Criminal Appeals. Copy of the decision of the Supreme Court of Tennessee

denying writ of certiorari is annexed hereto at A1. Copy of the judgment pursuant to the opinion is annexed hereto at A2. Copy of the opinion of the Tennessee Court of Criminal Appeals is annexed hereto at A5.

JURISDICTION

Final judgment of the Supreme Court of Tennessee was entered February 16, 1971. Jurisdiction here is invoked under 28 U.S.C. 1257(3).

HOW FEDERAL QUESTION IS PRESENTED

Petitioner Edgar C. Heald was denied due process and equal protection of the law as guaranteed him under the Fifth and Fourteenth Amendments to the Constitution of the United States.

The indictment in this case was returned January 29, 1968, charging petitioner and others in substance that on the ..... day of August, 1967, in Knox County, Tennessee, with force and arms did feloniously and forcibly commit burglary by breaking and entering a certain "pay telephone coin box, property of Southern Bell Telephone Company, a Corporation", with intent to commit a felony, to-wit: a larceny, that is to say, that they would carry away the goods and chattels of "Southern Bell Telephone Company, a Corporation", to-wit: a pay telephone coin box and deprive the lawful owner of the use thereof. Copy of the indictment is annexed hereto at A7.

Upon the trial, petitioner was found guilty of third degree burglary and sentenced to not less than three years nor more than five years imprisonment. At the request of petitioner, the State refused to provide the date in August, 1967 that it is alleged the offense occurred, so as to afford petitioner an opportunity to prove by alibi witnesses that he was not present.

The facts of the case show that this was an ordinary pay telephone booth, with which the Court is familiar, which stands out in a public place for the use of the public with no lock on the door and with the door wide open. The facts of the case show further that the conviction was predicated on the testimony of a witness who testified that from a height some distance away he saw petitioner and others enter this telephone booth and that newspapers were pasted around the booth and that he saw petitioner and others fondle the bottom part of the telephone. The door on the outside of the telephone which leads to the coin box was later found to have been taken off, but the coin box was not entered, nor was the coin box removed.

There is no statute in Tennessee making it specifically unlawful to break into a telephone, or to tamper with a telephone, or to burglarize a telephone coin box. The indictment does not set forth the statute upon which it is predicated. Petitioner was convicted and a sentence of three to five years imposed, which is the penalty for third degree burglary. The Tennessee Code defines third degree burglary as follows:

Tennessee Code Annotated:

"*39-904. Burglary in third degree—Safe-cracking —Penalty.*—Burglary in the third degree is the breaking and entering into a business house, outhouse, or any other house of another, other than dwelling house, with the intent to commit a felony. Every person convicted of this crime shall be imprisoned in the penitentiary for not less than three (3) years nor more than ten (10) years.

"Any person who, with intent to commit crime, breaks and enters, either by day or by night, any building, whether inhabited or not, and opens or attempts to open any vault, safe, or other secure place

by any means, shall be punished by imprisonment for a term of not less than three (3) nor more than twenty-one (21) years."

The Tennessee Court of Criminal Appeals in its opinion stretches 39-904 Tennessee Code Annotated in this case to cover the purview of 39-902 Tennessee Code Annotated, and affirms the conviction based on 39-902 Tennessee Code Annotated, which provides as follows:

> "*39-902. Breaking after entry.*—Any person who, after having entered upon the premises mentioned in §39-901, with intent to commit a felony, shall break any such premises, or any safe or receptacle therein, shall receive the same punishment as if he had broken into the premises in the first instance."

It is to be noted, however, that under the facts the coin receptacle was not tampered with, nor taken, and this obviously obviates the position of the Supreme Court of Tennessee that § 39-902 Tennessee Code Annotated would sustain the conviction under the facts, and also makes *Fox* v. *State,* 214 Tenn. 694, 383 S.W.2d 25, inapplicable.

Timely motion was made to quash the indictment because this offense was not covered by statute but the Court overruled the motion. It is submitted there is no statute in Tennessee covering the alleged offense in this case, and, therefore, petitioner has been denied due process and equal protection of the law as guaranteed him under the Fifth and Fourteenth Amendments to the Constitution.

The most that can be said is that prosecution of this case might have been had at common law for the offense of malicious mischief which is a misdemeanor and would carry one year or less penalty, whereas, sentence imposed is three to five years imprisonment.

QUESTION PRESENTED

Question No. 1: Was petitioner denied due process and equal protection of the law as guaranteed him under the Fifth and Fourteenth Amendments to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS INVOLVED

Pertinent portions of the Fifth Amendment provide as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, * * * nor be deprived of life, liberty, or property, without due process of law; * * *"

Pertinent portions of the Fourteenth Amendment provide as follows:

> "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

TENNESSEE STATUTES INVOLVED

Tennessee Code Annotated §§ 39-902 and 39-904

REASONS FOR GRANTING THE WRIT

The question presented here insofar as can be determined is one of first impression. The Supreme Court of Tennessee in this case attempts to affirm the conviction by pulling up its own boot straps by a decision which it decided in *Fox* v. *State,* 214 Tenn. 694, 383 S.W.2d 25. It is obvious that the Tennessee Court of Criminal Appeals, supported by denial of the petition for writ of certiorari

by the Supreme Court, is attempting to legislate a criminal offense pertaining to the breaking into a telephone by the use of a statute which the Supreme Court admits was originally designed to protect houses against an unlawful entry, and it is using a statute carrying a felony penalty of three to ten years, whereas the most that could be made of the case would be a common law offense of malicious mischief which carries a misdemeanor penalty of less than one year. The offense of larceny could not be invoked in this case, because nothing was stolen.

If the Legislature of Tennessee had intended to protect telephones and the coin boxes attached thereto against illegal entry and provide a felony penalty of three to ten years it would have enacted a special statute rather than permitting the State to use the more severe offense of illegal entry and burglary of a house to cover telephones.

This case is of great importance because it is an effort by a State judiciary to legislate rather than adjudicate, and to stretch a statute to cover an offense which the Legislature never intended that it cover. The presumption, it would seem, is that the Legislature was cognizant of the fact that there was a common law offense in Tennessee of malicious mischief and that any indictment for molesting a telephone in a public booth would be brought under the common law rather than statutory provisions.

It would seem inconceivable that the Legislature of Tennessee, if it had seen fit to pass criminal legislation protecting telephones from illegal entry, would have placed such a severe penalty as punishment of three to ten years imprisonment. We think this fact alone negates the decision of the Tennessee Court of Criminal Appeals, as approved by denial of writ of certiorari by the Supreme Court of Tennessee.

The motion to quash the indictment should have been granted by the Tennessee Court of Criminal Appeals and the case reversed and petitioner tried under a proper statute or for a common law offense.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM EARL BADGETT
608 Bank of Knoxville Building
Knoxville, Tennessee 37902

HAL H. CLEMENTS, JR.
401 Empire Building
Knoxville, Tennessee 37902
Attorneys for Petitioner

SUPREME COURT OF TENNESSEE AT KNOXVILLE
SEPTEMBER TERM 1970

(Filed Feb. 16, 1971, John A. Parker, Clerk)

Edgar C. Held
vs.
State of Tennessee
} Knox Law

WRIT DENIED

This case coming on to be heard upon a transcript of the record from the Criminal Court of Knox County, opinion and decree of the Court of Criminal Appeals, petition for certiorari, assignments of error and briefs of counsel, upon consideration whereof the Court is of opinion that the petition for writ of certiorari is not well taken, and said petition is denied.

The petitioner Edgar C. Held will pay the costs incident to filing petition for certiorari, for which let execution issue.

CERTIFICATION

OFFICE OF CLERK OF SUPREME COURT

For the Eastern Division of the State of Tennessee

I, JOHN A. PARKER, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the Decree of said Court, pronounced at its September term, 1970, in the case of Edgar C. Held against State of Tennessee as appears of record now on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, on this the 24th day of February, 1971.

/s/ John A. Parker
Clerk
By /s/ Anna S. Boyd
D. C.

(Seal)

COURT OF CRIMINAL APPEALS OF TENNESSEE,
AT KNOXVILLE

(Filed December 1, 1970)

Edgar C. Held
vs.
State of Tennessee

No. 82 Knox County
Offense Third Degree Burglary
AFFIRMED

JUDGMENT

Came the plaintiff in error Edgar C. Held, by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Knox County; and upon consideration thereof this Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by this Court.

It is, therefore ordered and adjudged by this Court that the plaintiff in error, for his offense of Third Degree Burglary be delivered to the Warden of the penitentiary, or his agent, and be by him committed to the penitentiary of the State of Tennessee and there confined at hard labor for a term of not more than Five (5) years, and not less

than Three (3) years, commencing on the day of his reception at said penitentiary.

The sentence of imprisonment will be credited with the time the plaintiff in error spent in jail pending this appeal. The number of days of such confinement will be certified to the Warden by the Clerk of the Court below.

It is further ordered by the Court that plaintiff in error be infamous and disqualified from holding any office under this State, or exercising the elective franchise.

The plaintiff in error will pay the costs of the cause accrued in this Court, and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Knox County, directing that Court to proceed with the collection of the costs of the cause accrued therein in the manner provided by law.

The Clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Knox County, which will be his authority for delivering the plaintiff in error to the Warden or his agent; and also a duly certified copy hereof to the Warden of the penitentiary, who will at once proceed to execute this judgment.

In the event the plaintiff in error files a petition for certiorari in the Tennessee Supreme Court, he may be admitted to bail on bond in the penalty of $6,000.00 with sufficient sureties to be approved by the Clerk of this Court, conditioned as in bail bonds in felony appeals, for his appearance in the Supreme Court; and in default of such bond he will be remanded to the Sheriff of Knox County.

Charles Galbreath
John A. Mitchell
William S. Russell

CERTIFICATION

OFFICE OF CLERK OF COURT OF CRIMINAL APPEALS

For the Eastern Division of the State of Tennessee

I, JOHN A. PARKER, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the Judgment Order of said Court, pronounced at its December term, 1970, in the case of Edgar C. Held against State of Tennessee as appears of record now on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, on this the 24th day of February, 1971.

/s/ John A. Parker
Clerk

By _____
D. C.

(Seal)

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE
NASHVILLE, MAY SESSION, 1970.

(Filed December 11, 1970)

EDGAR C. HELD and JOHN RICHARD HALL, Plaintiffs-in-Error v. STATE OF TENNESSEE, Defendant-in-Error	No. 82 Knox County Hon. Joe D. Duncan, Judge (Burglary)

For the Plaintiffs-in-Error:

Hal H. Clements, Jr., Empire Building, Knoxville, Tennessee. Eugene Mynatt, 401 Brandau Drive, Knoxville, Tennessee.

For the Defendant-in-Error:

David M. Pack, Attorney General of Tennessee. Lance D. Evans, Assistant Attorney General. Joseph J. Nigro and Don R. Coffey, Assistant District Attorneys, General.

Affirmed
William S. Russell,
Judge

OPINION

Plaintiffs-in-error, Edgar C. Held and John Richard Hall, have perfected an appeal in the nature of a writ of error from their joint trial and conviction of burglary in the third degree.

Retained counsel have assigned but one error. It is contended that the indictment should have been quashed, on the premise that burglary is not committed by breaking into the coin box of a pay telephone. We are asked to overrule *Fox* v. *State,* 214 Tenn. 694, 383 S.W.2d 25, decided in 1964, which specifically held that the fact that a telephone booth was open to the public and hence lawfully entered did not prevent one breaking into the money receptacle from being guilty of third degree burglary.

We, being an intermediate appellate court, have no authority to overrule a clear and controlling authority promulgated by our Supreme Court. We are satisfied that *Fox* v. *State,* supra, controls the single issue presented; and that the judgment of the trial court should be affirmed.

/s/ William S. Russell
William S. Russell, Judge

Concur:

/s/ John A. Mitchell
John A. Mitchell, Judge

/s/ Charles Galbreath
Charles Galbreath, Judge

INDICTMENT

(Filed January 29, 1968)

STATE OF TENNESSEE, COUNTY OF KNOX
CRIMINAL COURT FOR KNOX COUNTY
NOVEMBER TERM, 1967

The Grand Jurors for the State of Tennessee, upon their oaths, present That EDGAR C. HELD, ALIAS & JOHN RICHARD HALL, ALIAS & DAVID O. SKOWRONEK, ALIAS & WANDA STEELE, ALIAS heretofore, to-wit: On the ..... day of August, 1967, in the State and County aforesaid, then and there with force and arms feloniously and forcibly did commit burglary by breaking and entering a certain pay telephone coin box, property of Southern Bell Telephone Company, a Corporation, with the intent of the said defendants, then and there to commit a felony, to-wit: A larceny, that is to say, with the intent to feloniously take, steal and carry away the goods and chattels of Southern Bell Telephone Company, A Corporation then and there to be had and found in said pay telephone coin box and so to deprive the true owner aforesaid, of the use thereof against his will and consent, contrary to the statute and against the peace and dignity of the State.

/s/ Clarence Blackburn
District Attorney General